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IN THE

Supreme Court of the United States

October Term, 1984

HONORABLE JOHN WESTHAFER, as JUDGE of the CIRCUIT COURT OF DECATUR COUNTY, INDIANA, *et al.*,

Appellants,

v.

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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QUESTIONS PRESENTED BY APPEAL

1. Whether a State has any power to statutorily authorize judicial protection of the administration of justice by use of indirect contempt procedures against the press subsequent to disclosure, before arrest, of the specific fact that a particular sealed criminal indictment or information is in existence or pending.

2. Whether the State's interest in preserving public safety and health is a compelling state interest that is sufficient to justify the subsequent use of indirect contempt procedures, when no less restrictive and effective means are available, against the press for disclosing, before arrest, the specific fact that a particular sealed criminal indictment or information is in existence or pending.

STATUTE INVOLVED IN CASE

The statute, which was declared unconstitutional *on its face* by the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) as infringing on First Amendment freedoms of the press, is Indiana Code §35-34-1-1(d), which provides:

> (d) The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

Similar provisions in other states are discussed at pages 6-7 of the Jurisdictional Statement, and some such provisions are appended thereto at A-21 to A-29.

LIST OF PARTIES

Appellants in this case are the Honorable John Westhafer, as the Judge of the Circuit Court of Decatur County, Indiana, and Kenneth Bass, as the Prosecutor of Decatur County, Indiana. Appellees in this case are Worrell Newspapers of Indiana, doing business as the Greensburg Daily News, and Karen McKinley, a reporter for the Greensburg Daily News.

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The questions presented by this appeal involve only the declaration of *facial* unconstitutionality of an Indiana state statute by the Seventh Circuit. Although the Motion to Affirm did not directly address the two (2) questions in the Jurisdictional Statement, certain arguments of the Appellees deserve rebuttal.

1. The Appellees assert, without direct authority, that this Court has *de facto* created a *per se* rule invalidating any attempt by a state legislature to statutorily authorize its judiciary to protect the administration of justice by using indirect contempt procedures against the press. This assertion trivializes all of the decisions of this Court

applying the "clear and present danger" test. The Motion to Affirm quotes one sentence authored by Mr. Justice Douglas, while ignoring the thoughtful application of the test by this Court to the particular facts of each case. *See Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed.2d 192 (1941).

The issue for decision in this appeal is whether the Indiana legislature exercised its discretion within constitutional limits in enacting Indiana Code §35-34-1-1(d). Both parties agree that the Indiana legislature specifically considered whether to broaden the scope of coverage of those persons disclosing the existence of criminal charges before arrest. Indiana Code §35-34-1-1(d) represented the legislative judgment that, in Indiana, the problem required amendment of the predecessor statute to potentially include the press in some particular cases. This Court has indicated that legislative discretion was present in this area:

> There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to require a newsman's privilege, either qualified or absolute.[1]

Branzburg v. Hayes, 408 U.S. 665, 706, 92 S.Ct. 2646, 2669, 33 L.Ed.2d 626 (1972). The Indiana legislature crafted

[1] Interestingly, the Indiana legislature enacted the Indiana Shield Statute, Indiana Code §34-3-5-1, which the Indiana Court of Appeals recently construed so as to require an absolute privilege. *Jamerson v. Anderson Newspapers, Inc.* (1984), Ind. App., 469 N.E.2d 1243, 1246.

Indiana Code §35-34-1-1(d) upon the model guidance of this Court, i.e., the preferred method of state action is for the state legislature to impose express statutory limitations on the use of the contempt power, but avoid a self-executing statute of general application in favor of a case-by-case determination of the specific "clear and present danger" by a neutral and detached trial court. *Wood v. Georgia*, 370 U.S. at 385, 82 S.Ct. at 1370; *Bridges v. California*, 314 U.S. at 260-261, 62 S.Ct. at 192. Since it has been nearly 23 years since this Court has applied the "clear and present danger" test to appropriate facts,[2] this appeal presents an ideal opportunity to reaffirm the vitality of the "clear and present danger" test and delineate the scope of discretion for State legislatures and State courts in this area.

2. Indiana Code 35-34-1-1(d) is not a prior restraint or a self-executing criminal statute of universal application. Even if this Court applies the "compelling state interest—no less restrictive means" test to Indiana Code §35-34-1-1(d) as urged by the Appellees, the Motion to Affirm has again trivialized the test. The Motion to Affirm essentially argues that since prior applications of the test resulted in the invalidation of statutes, this Court should abandon further application of the test in favor of automatic invalidation of the statute.

This argument is also a disguised plea for this Court to reverse its long-standing holdings and impose a *per se* rule prohibiting the state from protecting any state interest

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[2] The only modern case applying the "clear and present danger" test, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-845, 98 S.Ct. 1535, 1543-1545, 56 L.Ed.2d 1 (1978), should not control, since Mr. Chief Justice Burger stated therein:

> We question the relevance of that standard here; moreover we cannot accept the mechanical application of the test which led that court to its conclusion. 435 U.S. at 842, 98 S.Ct. at 1543.

when press publication may be involved, regardless of the circumstances in a particular case. This Court has consistently refused to enact such a *per se* prohibition, even for prior restraints, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 569-70, 96 S.Ct. 2791, 2808, 49 L.Ed.2d 683 (1976), despite press pleas for a *per se* rule. *See* Marcus, *The Media in the Courtroom*, 57 IND. L.J. 235, 246, n. 78 (1982). Proper application of the "compelling state interest—no less restrictive means" test should lead to the conclusion that Indiana Code §35-34-1-1(d) is *facially* constitutional.

3. The Jurisdictional Statement sets forth reasons why fifteen (15) states, including Indiana, have provisions which might arguably be construed as broadly as Indiana Code §35-34-1-1(d). See pages 6-7. The Motion to Affirm asserts that only four (4) such states have similar statutes. In any event, the number of states enacting a particular standard into law in our federal system should not be determinative of whether an enactment meets the minimum threshhold of *facial* constitutionality.

4. The Motion to Affirm includes extensive factual background to show that Judge Westhafer threatened to *apply* Indiana Code §35-34-1-1(d) so as to unconstitutionally infringe Appellees' rights. These facts are not relevant to the sole issue, which is whether said statute is *facially* unconstitutional. Furthermore, as a matter of law, Judge Westhafer could not have applied said statute and found Appellees in contempt. Jurisdictional Statement, p. 4. These facts show that the public was thoroughly informed about all circumstances in this case. In addition, the Appellees' November 5, 1984 article on the day of the arrest discussed the criminal information and arrest, as well as their reasons for delaying publication of the criminal information for one (1) day. *Karen McKinley Declaration*, ¶ 7; *John Murphy Declaration*, ¶7 and Exhibit B attached thereto.

5. The Appellees have built and burned another straw man in their claim that the state's interests in this case (Jurisdictional Statement, pages 5-6, 8-9) would apply to a wide variety of law enforcement situations, effectively eviscerating carefully cultured press freedoms. There is *no* other stage of criminal proceedings wherein state interests are identical to the stage after indictment and before arrest. First, unlike stages of criminal proceedings after arrest, no outcome-determinative event will occur that will deprive the press and public of the chance to observe and comment on the handling of the case in the criminal justice system. Unlike earlier stages in such proceedings, the state's interests in processing the suspect through the system after charges are formally filed have been confirmed (to the extent of finding probable cause) by a neutral and detached court. Furthermore, the state is far more likely to decide not to prosecute (an outcome-determinative event) prior to indictment, rather than after indictment and before arrest. There simply is no other identical stage of criminal proceedings with regard to the state's interests and the lack of potential for harm to the press and public.

6. Trial courts in Indiana are presumed to know all applicable law, including opinions of this Court, and statutes are routinely construed so as to incorporate federal and state constitutional requirements. This would include the need for findings or clear evidence in the record to support the order, as well as any consideration of less restrictive alternatives before entering such an order.

7. Since the Seventh Circuit did not decide whether Indiana Code §35-34-1-1(d) was unconstitutionally applied in this cause, or whether Appellees have a constitutional right of access to information about criminal proceedings, this Court should reverse and remand for the Seventh Circuit's consideration of these other issues.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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